

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3
4 In the Matter of)
5)
6 Winning the Senate and Jason F. Emert) MUR 6893
7 in his official capacity as treasurer)
8

9 **SECOND GENERAL COUNSEL'S REPORT**

10
11 **I. ACTIONS RECOMMENDED**

12 We recommend that the Commission: (1) Enter into pre-probable cause conciliation with
13 Winning the Senate and Jason F. Emert in his official capacity as treasurer ("WTS"); (2) approve
14 the attached conciliation agreement; and (3) approve the appropriate letter.

15 **II. BACKGROUND**

16 The Complaint in this matter, filed by Senator Rand Paul, alleged that WTS, an
17 independent-expenditure-only political committee, sent an email on October 12, 2014, that
18 solicited funds for WTS using his name as one of four purported senders¹ without his permission
19 or authorization. On April 12, 2016, the Commission found reason to believe that WTS violated
20 52 U.S.C. § 30124(b) by fraudulently misrepresenting that Senator Paul sent and endorsed an
21 email soliciting funds for WTS.² Pursuant to the Commission's findings, the Office of the
22 General Counsel commenced an investigation to determine the full scope of WTS's activities.³

23 The results of our investigation are detailed below, along with our recommendation that
24 the Commission authorize pre-probable cause conciliation
25

1 The other candidates listed in the email were Senators Ted Cruz, Mike Lee, and Marco Rubio.

2 See Certification, April 14, 2016.

3 See First Gen. Counsel's Rpt. at 11.

1 **III. SUMMARY OF INVESTIGATION**

2 The investigation confirmed that WTS solicited contributions using the names of federal
3 candidates and officeholders without their permission, thereby fraudulently misrepresenting that
4 those individuals sent the WTS emails and endorsed WTS's fundraising efforts, in violation of
5 the Federal Election Campaign Act of 1971, as amended (the "Act").

6 WTS operated as a project of HardenGlobal, a political consulting firm headed by Tyler
7 Harber. WTS's stated purpose was "winning the senate" for Republicans in the November 2014
8 general election.⁴ It operated from early September 2014, when it started sending fundraising
9 and list-building emails using HardenGlobal's email lists,⁵ through December 2014, when it
10 ceased activity following Harber's arrest in connection with HardenGlobal work unrelated to the
11 activity at issue in this matter. HardenGlobal shut down following Harber's arrest, and Harber
12 pleaded guilty in February 2015 to violating the Act and making a false statement.⁶

13 To determine the scope of WTS's operation, we conducted interviews of WTS's
14 treasurer, Jason Emert, its compliance vendor, Chris Marston, Harber, and four former
15 employees of HardenGlobal, two of whom started SurgeRed, a political consulting firm formed
16 after HardenGlobal's closure. We sought to obtain copies of WTS's solicitation emails from
17 WTS and SurgeRed. Although we were not able to obtain copies of all solicitation emails sent

⁴ See, e.g., Letter from Ronald Jacobs (counsel to Joni for Iowa), May 24, 2017, Attach. 2 (purported WTS email from Ernst stating, "That is why I stand with other Republican Senators and nominees in supporting Winning the Senate PAC, a new initiative exclusively dedicated to securing a Republican majority in the United States Senate.").

⁵ Jason F. Emert ROI at 4 (Mar. 8, 2018) ("Emert ROI").

⁶ See *United States v. Harber*, Crim. No. 1:14-CR-373 (E.D. Va. Feb. 12, 2015). In 2012, Harber was serving as a candidate's campaign manager and the head of an independent-expenditure-only political committee ("IEOPC") at the same time. In connection with his guilty plea, Harber admitted that he directed the IEOPC to spend \$325,000 on ads opposing that candidate's opponent. Harber also admitted that he made false statements to the FBI.

1 by WTS, we were able to obtain some emails from WTS's compliance vendor. As discussed
2 below, these emails and corroborating information from witnesses provide details about the
3 scope of WTS's activities.⁷

4 Andrew Ransom, a HardenGlobal employee assigned to work on WTS, said that Harber
5 drafted almost all WTS solicitation emails and reviewed and approved all of them.⁸ Ransom
6 estimated that about 30 different WTS emails were disseminated.⁹ Not all of WTS's emails
7 solicited funds, at least directly. Some emails were sent to prospect supporters' names and email
8 addresses.¹⁰

9 Starting in September 2014, the earliest WTS prospecting and solicitation emails
10 included the names of Senators Mike Lee and James Lankford, HardenGlobal clients who
11 authorized the use of their names.¹¹ Around that time and at Harber's direction, Emert and
12 others at HardenGlobal sought to obtain approval from various other federal officeholders and
13 candidates to use their names in the fundraising emails.¹² We do not know if they sought
14 approval from all the candidates and officeholders whose names WTS used; however, in
15 instances where WTS did attempt to obtain approval, the investigation revealed that WTS's

⁷ Although WTS responded (albeit late) to the Complaint, counsel who filed the Response did not respond to multiple attempts to contact him after the Commission found RTB and, thus, WTS has not been represented by counsel during the investigation. Emert has been the point of contact for WTS.

⁸ Andrew Ransom Report of Investigation at 2 (June 24, 2016) ("Ransom ROI"). Ransom also provided an affidavit that was submitted with WTS's Complaint Response.

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ Emert ROI at 4. *See also* Ransom ROI at 3 (Senator Lee's office had authorized use of Lee's name).

¹² Emert ROI at 4.

1 effort to obtain approvals was incomplete and sometimes included misrepresentations about
2 WTS.

3 In addition to Complainant Paul, the investigation discovered four additional candidates
4 whose names were used by WTS without the candidate's approval. Emert acknowledges that
5 Senators Marco Rubio and Ted Cruz, who were also included in the email that was the subject of
6 Senator Paul's Complaint, did not give WTS permission to use their names.¹³ Further, internal
7 WTS emails revealed that WTS used the names of then-candidates Joni Ernst and Thom Tillis in
8 solicitation emails without their approval.¹⁴ As described, below, the Ernst and Tillis
9 committees provided copies of correspondence with WTS.

10 On October 6, 2014, counsel for the Thom Tillis Committee sent a letter to Emert stating
11 that WTS sent an unauthorized fundraising email under Tillis's signature.¹⁵ Counsel said that,
12 "Disseminating an email made to appear that it was sent from Speaker Tillis's email account
13 urging prospective donors to 'join me in putting the Senators to work for our future generations'
14 is fraudulent and must cease immediately."¹⁶ Emert responded that the email did not solicit
15 funds but merely asked recipients to add their names to a commitment page on WTS's website,
16 and claimed that the Tillis Committee had given authority.¹⁷ Tillis's counsel wrote back saying
17 that WTS misrepresented its structure to Tillis campaign personnel by failing to disclose that

¹³ *Id.* In addition, Emert acknowledged that the purported signer of the Complaint email, "T.J. Stokes," was false and no such person exists. *Id.* at 5.

¹⁴ Marston continues to file WTS disclosure reports but has not been paid in "eons." Christopher Marston Report of Investigation, July 20, 2016 ("Marston ROI").

¹⁵ Letter from Roger Knight to Jason Emert, Oct. 6, 2014.

¹⁶ *Id.*

¹⁷ Jason Emert email to Knight, Oct. 6, 2014, 3:37 pm (attached to Tillis Response).

1 WTS is an independent-expenditure-only committee and, under those false pretenses, received
2 approval by a junior level staffer.¹⁸

3 Similarly, on October 7, 2014, counsel for Joni Ernst for U.S. Senate sent a letter by
4 email to Emert demanding that WTS stop all activities using Ernst's name and signature.¹⁹ In
5 the letter, counsel accused WTS of misrepresenting the nature of the email prospecting plan,
6 WTS's structure as an IEOPC, and that the NRSC backed WTS.²⁰

7 After the November 4, 2014, general election, WTS appears to have been winding down
8 and received no contributions after November 21. Although WTS continues to file disclosure
9 reports with the Commission, it effectively ceased operating when HardenGlobal shut down in
10 December 2014 due to the criminal investigation of Harber.²¹

11 On February 12, 2015, Harber pleaded guilty to two criminal counts, one under the Act
12 for coordinated "contributions" and the other for making a false statement.²² Harber served an
13 almost-two-year long sentence and was released in April 2017.

14 Following HardenGlobal's closing, Tony Marsh and David Denehy, previously identified
15 as part of HardenGlobal's team, formed a new political consulting firm, SurgeRed, and hired
16 some former HardenGlobal employees. Marsh and Denehy individually state that they had
17 nothing to do with WTS and that they have no records, furniture, or equipment from

¹⁸ Letter from Knight to Emert, Oct. 8, 2014.

¹⁹ Letter from Ronald Jacobs to Emert, Oct. 7, 2014.

²⁰ *Id.* See also Emert ROI at 5. Both the Tillis and Ernst committees expressed concern to Emert about the possibility of unintentionally accepting a contribution from an IEOPC, which are prohibited from making contributions to candidates.

²¹ According to Ransom, Harber's criminal case created "bedlam" at HardenGlobal. Ransom ROI at 5.

²² See *supra* n.6.

1 HardenGlobal.²³ Marsh, who states that he had no affiliation with HardenGlobal, says that
2 Denehy, "a distant partner" in HardenGlobal, asked him to assess HardenGlobal's viability after
3 Harber's departure.²⁴ He concluded that HardenGlobal should be shut down because of past
4 misrepresentations regarding existing clients and financial obligations.²⁵

5 It appears that SurgeRed operated for about a year after HardenGlobal's closure. In May
6 2017, Marsh stated that SurgeRed was not actively consulting and that he intended to close
7 soon.²⁶ The website does not appear to have been updated since 2015.²⁷

8 IV. LEGAL ANALYSIS

9 The Act and Commission regulations prohibit persons from "fraudulently
10 misrepresent[ing] the person as speaking, writing, or otherwise acting for or on behalf of any
11 candidate or political party or employee or agent thereof for the purpose of soliciting
12 contributions or donations[.]"²⁸ "[A] representation is fraudulent if it was reasonably calculated
13 to deceive persons of ordinary prudence and comprehension."²⁹

²³ Tony Marsh Report of Investigation, May 23, 2017 ("Marsh ROI"); David Denehy Report of Investigation, May 24, 2017. See also SurgeRed Subpoena Response, May 15, 2017.

²⁴ Marsh ROI.

²⁵ *Id.*

²⁶ Marsh ROI.

²⁷ See <http://surge-red.com/>.

²⁸ 52 U.S.C. § 30124(b)(1); 11 C.F.R. § 110.16(b)(1).

²⁹ *FEC v. Novacek*, 739 F.Supp.2d 957, 961 (N.D. Tex. 2010). See also *United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004) (citing *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954) (in a scheme devised with the intent to defraud, the fact that there is no misrepresentation of a single existing fact makes no difference in the fraudulent nature of the scheme)).

1 The investigation has confirmed the Commission's reason-to-believe finding that WTS
2 violated 52 U.S.C. § 30124(b) by fraudulently misrepresenting that Senator Paul approved and
3 endorsed a solicitation by WTS. In addition to Senator Paul, WTS falsely represented that then-
4 candidates Joni Ernst and Thom Tillis endorsed WTS's fundraising efforts by making it appear
5 that they sent emails in support of WTS, and WTS admits that Senators Rubio and Cruz did not
6 authorize the use of their names in the solicitation email attached to the Complaint. Thus, WTS
7 fraudulently misrepresented that it was "speaking, writing, or otherwise acting for or on behalf
8 of" Senators Paul, Rubio, Cruz, Ernst, and Tillis.

9 While we believe that WTS likely did not have authorization from other federal
10 candidates and may have used their names anyway in solicitation emails, the lack of complete
11 records has hampered our ability to obtain a definitive accounting of WTS's activities. At this
12 point, though the record is not complete, we conclude that we have sufficient information to
13 proceed to pre-probable cause conciliation and that further investigation, including service of
14 additional subpoenas and depositions, is unlikely to produce enough additional information to
15 warrant expending further Commission resources.

16 Although we cannot determine what percentage of WTS's disclosed contributions
17 resulted from fraudulent emails, it is clear that some portion of them did. Based on WTS's
18 disclosure reports, from September through the end of 2014, WTS accepted \$114,694 in
19 contributions and made \$40,064 in independent expenditures.³⁰ According to Ransom, the email
20 submitted with the Complaint generated \$16,627 in contributions.³¹ WTS's operating

³⁰ See WTS 2014 Year End Report at 2-5 (Jan. 30, 2015). The information is unclear whether WTS's disclosure reports accurately reflect contributions and expenditures. The available information shows, however, that a large portion of their contributions likely came from fraudulent email solicitations.

³¹ Andrew Ransom Affidavit, May 21, 2015, ¶ 10. That email, dated October 12, 2014, followed-up a similar email sent two days earlier. The October 10 email generated \$9,084 in contributions.

1 expenditures totaled \$64,678, the majority of which went to HardenGlobal for website expenses
2 and fundraising commissions.³² Other expenses included list rental and credit card processing
3 fees. WTS disclosed no activity after 2014, and its 2014 ending cash on hand, \$9,571.71, has
4 remained the same since then.

5 Since WTS was a project of HardenGlobal and Harber reportedly had approval authority
6 over all WTS solicitation emails, it appears Harber bears primary responsibility for the
7 fraudulent solicitations made by WTS. Given the short length of time WTS was active and
8 Harber's significant criminal sentence for an unrelated criminal FECA violation, we do not
9 believe that pursuing an enforcement action as to Harber would be a good use of the
10 Commission's resources.³³

11 Moreover, WTS, through its treasurer Emert, has expressed an interest in conciliating this
12 matter and has indicated a willingness to admit to WTS's violations of the Act in connection
13 with the fraudulent solicitations. Under the circumstances presented here, we believe that such a
14 conciliation agreement with WTS would be sufficient to vindicate the Commission's interests in
15 this matter.

16 Although there is a basis to consider personal liability for Emert due to his active
17 involvement in setting up WTS — filing WTS's forms with the Commission, signing on as

³² Emert states that he believes WTS was conceived by HardenGlobal to pay HardenGlobal. Emert ROI at 6.

³³ Likewise, based on the information provided by Marsh and Denehy, *supra* at 5-6, and because neither Harber nor Emert were employed by SurgeRed, we do not recommend that the Commission pursue SurgeRed in connection with the fraudulent WTS solicitation emails. Even assuming that HardenGlobal could be liable under the Act, it does not seem likely that successor liability would extend to SurgeRed. In general, a new corporation is not considered a successor, even if assets are transferred, unless an exception, such as fraud to evade liability, mere continuation (same officers and directors), express assumption, or *de facto* merger are found. *See* First Gen. Counsel's Rpt. at 5-7, MUR 5666 (Mitchell Wade and True Norte f/k/a MZM, Inc.) (discussing successor liability theories; MZM sold its assets but remained ongoing entity with a new name and Commission did not need to determine liability of asset purchaser); *see generally* Fletcher Cyclopedia of Corps. §§ 7122, 7329 (2017). In this matter, Marsh states that SurgeRed did not acquire any physical assets of HardenGlobal and there are no other indicia that SurgeRed is a successor.

1 treasurer, and trying to enlist federal officeholders to partner with WTS, whether at Harber's
2 direction or not — we recommend that the Commission pursue a conciliation agreement with
3 Emert as treasurer only in his official capacity. Emert has consistently said that he did not know
4 what was happening at WTS for much of the time period at issue because he was not there.³⁴
5 Furthermore, he apparently became ill in mid-October 2014 and was in and out of hospitals in
6 Tennessee through the end of November 2014.³⁵ By that time, WTS had already ceased its
7 solicitations.³⁶ He says that he heard about the criminal investigation of Harber while
8 hospitalized and has not spoken to Harber since October 2014.³⁷ Given that we are not
9 recommending proceeding against Harber, who was arguably more active in WTS's fraudulent
10 solicitations, we do not recommend that the Commission proceed against Emert in his personal
11 capacity. Thus, we recommend that the Commission authorize pre-probable cause conciliation
12 with WTS and Emert in his official capacity as treasurer.

³⁴ Emert ROI at 5. Emert also has consistently claimed that he was not supposed to remain as WTS treasurer after the initial filing of FEC papers and that the plan was always that he would be replaced.

³⁵ *Id.*

³⁶ Emert said he never went back to WTS after his hospitalization
Id.

³⁷ *Id.*

VI. RECOMMENDATIONS

1. Enter into conciliation with Winning the Senate PAC and Jason F. Emert in his official capacity as treasurer prior to a finding of probable cause to believe;
2. Approve the attached Conciliation Agreement; and
3. Approve the appropriate letter.

Lisa J. Stevenson
Acting General Counsel

3/15/18
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